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IN THE

Supreme Court of the United States

October Term, 1961

No. 849

LINCOLN ROCHESTER TRUST COMPANY, as Administrator, c. t. a., of the Last Will and Testament of ALBERT E. COPELAND, deceased,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on January 10, 1962.

Opinions Below

The opinion of the District Court, printed in Appendix A, *infra* p. 24, is reported in 188 F. Supp. 839. The opinion of the Court of Appeals, printed in Appendix A, *infra* p. 19, is reported in 297 F. 2d 891.

Jurisdiction

The judgment of the Court of Appeals was dated and entered January 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented

What is the nature of the power to appoint the corpus of a decedent's estate that a life tenant must have in order for her interest to qualify for the marital deduction under the provisions of the Estate Tax Law?

Statute and Regulations Involved

The provisions of Sections 812(e)(1)(F) and 811(f)(3) of the Internal Revenue Code of 1939, as amended to date, and Regulation 81.47 a(c) (1), (13), (14), (15) and (16) appear in Appendix B, *infra*, pp. 28-33.

Statement of the Case

Petitioner seeks review of a judgment of the Court of Appeals for the Second Circuit which reversed the judgment of the United States District Court for the Western District of New York and denied the marital deduction for the residuary bequest to the surviving spouse under the will of Albert E. Copeland. The facts as stipulated by the parties (R. 7a-10a) were found by the District Court. They may be summarized as follows:

Albert E. Copeland was a resident of New York at the time of his death on September 26, 1950. His Last Will and Testament was admitted to probate in Surrogate's Court, Monroe County, New York on October 16, 1950. In the will decedent named his wife Jenny Morris Copeland, his Executor. Mrs. Copeland renounced her right to become Executor and Lincoln Rochester Trust Company was thereupon named as Adminis-

trator, c.t.a., in her place by the Surrogate's Court. The decedent's will provided in part:

> SECOND: I give, devise and bequeath to my wife, Jenny Morris Copeland, in case she survives me, the life use of all the rest, residue and remainder of my estate, both real and personal, wherever the same may be situated, with the right to use any part of the principal thereof.
>
> THIRD: I give, devise and bequeath Thirty-five Per Cent (35%) of the residue of my estate, after the death of my said wife, or in case my said wife shall predecease me, to each of my sons Morris A. Copeland and Arthur H. Copeland.

The remaining 30% was continued in trust for grandchildren.

On November 1, 1951, the Administrator filed a federal estate tax return and paid the tax computed therein. On the return a marital deduction of $148,589.00 was claimed with respect to the residuary estate. The Commissioner disallowed the deduction and assessed additional estate tax of $14,055.00, together with interest of $452.00, which was paid on July 10, 1952.

Following the assessment, the Administrator instituted a proceeding in the Surrogate's Court of Monroe County, New York for a construction of the second paragraph of decedent's will. On May 13, 1952 the Surrogate entered his decree of judicial settlement which provided in part:

> And the petitioner having requested a construction of the effect of paragraph 'Second' of decedent's Last Will and Testament, and a determination as to whether Sections 141 and 149 of the Real Property Law prohibit Jenny Morris Copeland from consuming the principal of the residuary estate, and due deliberation thereon having been had, it is further
>
> ORDERED, ADJUDGED AND DECREED that the purpose and effect of the said paragraph 'Second'

of decedent's Last Will and Testament was to give to Jenny Morris Copeland the life use of all of the residuary estate with an unlimited right to consume any or all of the principal thereof, and that neither of said Sections 141 nor 149 of the Real Property Law restrict in any way the right of the said Jenny Morris Copeland to consume any and all of the principal thereof.

The Administrator filed a claim for refund on June 27, 1955 for the $14,507 paid on July 10, 1952. The claim was disallowed by the District Director and suit was timely brought by the Administrator in the District Court.

The District Court held that under Section 812(e)(1)(F) of the Internal Revenue Code of 1939, as amended, Mrs. Copeland's power to use the decedent's residuary estate for her life qualified it for the marital deduction. Judgment was accordingly entered on February 7, 1961. Notice of Appeal was filed by the United States with the United States Court of Appeals for the Second Circuit on February 14, 1961. That Court by a decision made and entered on January 10, 1962 reversed the judgment of the District Court and dismissed the complaint.

The ultimate question to be decided is whether the residuary bequest to the widow of Albert E. Copeland qualifies for the marital deduction under Section 812(e)(1)(F) of the Internal Revenue Code of 1939 as amended by the Technical Amendments Act of 1958.

The basis for Federal jurisdiction in the Court of first instance, the United States District Court for the Western District of New York, was Section 1346 of title 28 of the United States Code.

Reasons for Granting the Writ

This Court on April 24, 1961 denied certiorari in the case, *May's Estate v. Commissioner*, 283 F. 2d 853 (2d Cir. 1960).

The opinion of the Second Circuit is set forth in Appendix C, *infra* p. 34. The issue in that case, with the exception of minor differences in the language of the will, is substantially similar to the one presented in the instant case. Because of the far reaching and continuing impact of the statute in question on estates of decedents throughout the entire United States, the Petitioner believes that it is of extreme importance that this Court interpret its meaning. To that end Petitioner asks the Court to hear and decide the issue presented by this case.

The specific language in dispute is Section 812(e)(1)(F) of the 1939 Code, as amended, which provides in part:

> In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest * * * with power in the surviving spouse to *appoint* the entire interest * * * (exercisable *in favor of such surviving spouse*, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, * * * to any person other than the surviving spouse—
>
> (i) the interest or such portion thereof so passing shall, for purposes of subparagraph (A), be considered as passing to the surviving spouse, and
>
> (ii) no part of the interest so passing shall for purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.
>
> This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest * * * whether exercisable by will or during life, is exercisable by such spouse alone and in all events. (Emphasis added.)

Petitioner believes that a power of appointment in the surviving spouse to use, consume or invade the principal of the estate for her own benefit in all events, unlimited by any standard relating to health, education, support or welfare is a broad

enough power to qualify her interest for the marital deduction.

Respondent contends and the Court below has held in this and other cases that in order to qualify for the marital deduction the surviving spouse must have the power to give the property away, that her power to consume the property must not, as it is in New York, be limited by the requirement of good faith, that she must be able to take the property free of the life tenancy and thereby be able to dispose of it by will, and that she must be able to create a fee in herself.

A Writ of Certiorari should be granted in this case for the following reasons:

1. This case is in conflict with a decision of the Court of Appeals for the Third Circuit.
2. The decisions of the Court of Appeals for the Second Circuit have left attorneys and judges in utter confusion as to the state of the law relating to the issue here presented.
3. An important question of interpretation of a Federal statute is involved.
4. The decision of the Court of Appeals for the Second Circuit completely misconstrues the statutory scheme.

1. Conflict with a decision in the Third Circuit.

The decision of the Court below is in conflict with the decision of the Court of Appeals for the Third Circuit in *Estate of Hoffman v. McGinnes*, 277 F. 2d 598 (1960).

Petitioner submits that the instant case is in direct conflict with the *Hoffman* case and that the conflict is not avoided by stating that the latter case turned on the construction of the particular will under applicable state law. The interpretation placed on the respective wills is virtually identical and the difference in result can only be explained by a different interpretation of the applicable Code Section. Although *Hoffman* is a 1954 Code case and *Copeland* a 1939 Code case, the 1939

statute, as amended in 1958, reads the same as the 1954 Code provision.

Note the language of the Wills wherein both life tenants have only the power to use and spend:

Hoffman, p. 603 of Opinion

"* * * *the right to use and* spend any or *all of the principal of my estate, if she so desires*, and upon her request or requests made to said * * * Trustees, they shall pay to her from time to time *any part of the principal of my estate she may desire and said trust shall cease as to that part of the principal so paid to her*'."

* * *

"'*It is my intention that my said wife, Zella G. Hoffman shall* have the whole income and interest from my estate and *use and spend any part or all of the principal that she may desire* during her lifetime'." (Emphasis by the Court.)

Copeland, supra p. 3.

I give, devise and bequeath to my wife, Jenny Morris Copeland, in case she survives me, the life use of all the rest, residue and remainder of my estate, both real and personal, wherever the same may be situated, *with the right to use any part of the principal thereof*. (Emphasis added.)

Third Circuit, p. 603

"It would be difficult, if not impossible, to state any more explicitly an intent to confer 'an unrestricted power exercisable at any time during her life *to use all or any part of the principal of the decedent's trust estate*." (Emphasis added.)

Copeland, supra p. 3.

ORDERED, ADJUDGED AND DECREED that the purpose and effect of the said paragraph 'Second' of decedent's Last Will and Testament was to give Jenny Morris Copeland the life *use of all of the residuary estate with an unlimited right to consume any and all of the principal thereof*, * * * (Emphasis added.)

It is submitted that there is no difference between the Pennsylvania law protecting the remaindermen when the widow at-

tempts to divert the fund and the New York law requiring the widow to exercise her power of use in good faith.

Third Circuit, p. 603

"The rationale of the Pennsylvania decisions, cited in Ellis' Estate, limiting a life tenant's withdrawals from principal, is the judicial safeguarding of remainder interests to assure compliance with the testators intent as to such interests."

* * *

"'* * * The court can only interfere to *protect the remaindermen* when the widow *attempts to divert the fund* from the purpose for which it was bequeathed her' (Emphasis supplied [by the Third Circuit])."

Second Circuit, p. 893

"* * * [It is] the well settled rule of New York that the right to consume is limited by a standard of good faith. The obligation, imposed by law, [is] to exercise the power in good faith based upon honest judgment, * * *."

The similarity of language used in the wills of Messrs. Hoffman and Copeland, similarly construed by the Courts of Pennsylvania and New York as to the limitations placed on the life tenants right to invade leads to just one conclusion, namely that the difference in result between the Third and Second Circuits can only be explained by a different interpretation of the meaning of the marital deduction statute. This conflict should be resolved by this Court.

2. Difference of Opinion below and confusion in District Courts.

Three different panels of judges of the Second Circuit Court of Appeals have passed on the issue presented in the case at bar. In two cases decided prior to the case at bar, it interpreted the statute as requiring the life tenant to have the power to dispose of the unconsumed corpus by will. In the instant case

the Court did not so hold. Note the following language from the earlier opinions:

> *During her lifetime* no restraint whatsoever is imposed on her power to consume or dispose of the principal of her life estate as she wishes. She has a power to *consume*, but she may not devise or bequeath any unconsumed corpus at her death to beneficiaries of her own choice. Thus her power under the terms of Mr. Pipe's will is not the 'unlimited power to invade' referred to in the regulations, * * *. *Estate of Edward F. Pipe v. Commissioner of Internal Revenue*, 241 F. 2d 210, 213 (2d Cir. 1957).

> We have already, in *Pipe's Estate v. Commissioner*, 2 Cir., 241 F. 2d 210, again by way of dictum, construed the unlimited power to invade necessary to satisfy Section 811 (f)(3) as *requiring that the life tenant be able to devise the property.* We held there what is equally plain here: That the power to invade at will does not comprehend the important power to appoint to the spouse or her estate. (Emphasis added.) *Estate of Ralph G. May v. Commissioner of Internal Revenue*, 283 F. 2d 853, 856 (2d Cir. 1960).

It is significant that when the petitioner in its brief in the Circuit Court forcefully called attention to the fact that nowhere in the statute is there a requirement that the life tenant must have the power to appoint the unconsumed corpus, the Court in its opinion made no mention of such a requirement as it had previously done in *Pipe* and *May*. The Court merely said, 297 F. 2d at 892:

> Unless the surviving spouse has the right to dispose of the principal by gift or otherwise in her absolute discretion the case is controlled by our decision in May, supra.

From this it would appear that if the power to dispose of the corpus by absolute gift is present, then there need be no power to dispose by will of the unconsumed corpus. But since the Court did not specifically refute its holding to the latter

effect in *Pipe* and *May*, it leaves one in utter confusion as to what, if anything, is the significance of those cases today.

It is interesting to note that the Circuit Court in referring to the ruling in the *May* case upon which it predicated its decision on the case at bar felt the need to offer an apology. The Court said:

> The ruling is quite technical but unfortunately that is too often so in tax matters. There may be arguments of policy for change in the statutory requirements to broaden the marital deduction, but this is a matter for Congress, which, with the problem plainly before it, failed in the Technical Amendments Act of 1958 to remove or modify the requirement that the power be exercisable in all events as a condition of the grant of the marital deduction in this situation. *United States of America v. Lincoln Rochester Trust Company, as Administrator, c.t.a., of the Last Will and Testament of Albert E. Copeland*, 297 F. 2d 891, 893 (2d Cir. 1962).

In 1958 the House had before it a bill (H.R. 8881) to amend Section 812 (e)(1)(F) of the 1939 Code to conform it to the language of Section 2056 (b)(5) of the 1954 Code. That bill contained the following paragraph:

> This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events. For purposes of the preceding sentence, a power is exercisable in all events if the surviving spouse has the unrestricted power exercisable at any time during the life of such spouse to use all or any part of the property subject to the power, and to dispose of it in any manner, *including the power to dispose of it by gift* (whether or not such spouse has the power to dispose of it by will). (Emphasis supplied.)

Section 93 (a) of the Technical Amendments Act amending Section 812 (e)(1)(F) omitted the last sentence of the fore-

going quotation and provided specifically that the requisite power will qualify:

> (* * * whether or not in each case the power is exercisable in favor of others).

This demonstrates a clear repudiation of the requirement that the surviving spouse must have the power to give the property away.

The confusion that exists below on this issue is evidenced by the following very recent comments of the District Courts:

> These same authorities demonstrate that 'power to appoint', as the phrase is used in the statute, means that the surviving spouse must be able to cut off remainder interests by withdrawing all or a specific portion of the principal from the testator's estate at any time *and* must be able to make an independent testamentary disposition of the unconsumed portion of the principal so withdrawn. (Emphasis added.) *Platt v. Gray*, 201 F. Supp. 401 (W. D. Ky., decided November 29, 1961).

> The government contends that to avoid the terminable interest rule the taxpayer must show the surviving spouse has the power to appoint all the property in question to herself or her estate, including the unconsumed portion; that a property interest cannot qualify for the marital deduction where it does not include the power to devise. [Citations omitted.]
>
> On the other hand plaintiff contends that where the surviving spouse has the unrestricted right to dispose of the property during her lifetime without the power to devise, the weight of authority allows the marital deduction. [Citations omitted.]
>
> This Court is of the view that Taxpayer's contentions in this regard must be sustained. The statute itself uses the disjunctive 'or' and the regulations contemplate that if the surviving spouse possesses the unrestricted power to use all or any part of the property during her life that is sufficient. *Estate of H. L. Nettz v. Phillips*, 62-1 U.S.T.C. para. 12064 (D.C.S.D. Iowa, decided February 12, 1962).

To require that a life tenant must be able to create a fee in herself so that she can then dispose of the property by will is to provide a back door route to circumvent the statutory language that the life tenant need not have the power to dispose of the property by will.

3. An important question of interpretation of a Federal statute is involved.

The importance of this issue lies in the fact that it affects the thousands of ordinary citizens who are attempting to dispose of their estates and who are not immediately accessible to the large cities where attorneys have facilities to be aware of and keep up to date on the intricacies required to draft a trust provision in a will so that it qualifies for the marital deduction. A very common form of testamentary disposition to the average lawyer and layman is to provide a life estate in the surviving spouse with an unlimited power to use the corpus and a provision that any unconsumed corpus will pass to children on the death of the spouse. Congress has met its responsibility to this group. The Courts by the construction placed upon this statute have unjustly penalized the large majority of citizens attempting to dispose of their property so as to qualify for the marital deduction.

The case at bar and those cases that have previously been decided represent a small fraction of the litigation that involves the issue presented here. The cases currently in dispute before the Internal Revenue Service and before the Courts are many. During the process of this litigation, counsel for Petitioner have had more than a dozen inquiries from various attorneys, banks and clients from places as distant from Rochester, New York as Denver, Colorado, Owensboro, Kentucky, and Lewiston, Maine. The case presents an important and significant issue as to the proper interpretation of a Federal statute

and a pronouncement by this Court will provide a meaningful guide which will benefit a large number of practitioners and citizens.

4. The decision of the Court of Appeals for the Second Circuit completely misconstrues the statutory scheme.

It is undisputed that the interest of the surviving spouse qualifies for the marital deduction if (1) she has the power to appoint the interest to herself and (2) the power is exercisable by her in all events.

In Section 811 (f) (3) *infra* p. 28, Congress has defined a general power of appointment exercisable in favor of one's self for purposes of inclusion of the property in the gross estate. In that section Congress has said that "the term 'general power of appointment' means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate", but does not include:

> A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent * * *.

The Regulation under Section 811 (f) (3) interprets the above quoted statutory provision to mean that:

> * * * [I]f a settlor transfers property in trust for the life of his wife, with a power in the wife to appropriate or consume the principal of the trust, the wife has a power of appointment. Regulation 105, Section 81.24 (b) (1).

Is it not reasonable to expect that the definition of power of appointment for one section of the estate tax law should apply in the section immediately following? Petitioner submits that it can demonstrate that law and equity compel this logical conclusion. In other words, if a power to consume, invade or appropriate property is not limited by an ascertainable standard

of the kind referred to in the above quotation from Section 811 (f)(3), then it must be a power of appointment under the marital deduction section, 812 (e)(1)(F) as well as under 811 (f)(3).

The case at bar is a 1939 Code case and the regulations in effect as of the date of Mr. Copeland's death are applicable, namely, 81.47a (c) of Treasury Regulations 105. The parts of this Regulation which are pertinent to the case at bar are set forth in Appendix B, *infra* p. 31.

Subparagraph (1) (iii) and (iv) thereof provides that:

> (iii) The surviving spouse must have the power, exercisable in favor of herself *or* her estate, to appoint the entire corpus free of the trust. (Emphasis supplied.)
>
> (iv) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

Subparagraph (3) provides that in order to satisfy the conditions in subparagraph (1) (iii) and (iv) above, the power in the surviving spouse must fall within one of the following categories:

> (i) A power so to appoint fully exercisable in her own favor at any time following decedent's death (as, for example, an unlimited power to invade).
>
> (ii) A power so to appoint exercisable in favor of her estate. Such power, if exercisable during life, must be fully exercisable at any time during life, or, if exercisable by will, must be fully exercisable irrespective of the time of her death.
>
> (iii) A combination of the powers described under subdivisions (i) and (ii) of this subparagraph * * *.

Up to this point the marital deduction Regulations follow the statutory definition of Section 811 (f)(3) defining a power of appointment for inclusion of the property in the gross estate

by permitting a power to invade which is not limited by a standard relating to the health, education, support or maintenance of the person possessing the power to qualify for the marital deduction.

It is subparagraph (14) of Regulation Section 81.47 a(c) which created the confusion in the first instance. It provides in its pertinent part:

> (14) The power in the surviving spouse must be a power to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases. Thus, if the surviving spouse entered into a binding agreement with the decedent to exercise the power only in favor of their issue, the condition in subparagraph (1) (iii) of this paragraph is not met.

This language says that the surviving spouse must have the power not only to dispose of the corpus to herself or her estate, but also to whomsoever she pleases. The latter requirement goes far beyond what subdivisions (i), (ii) and (iii) of subsection (13) of Regulation 81.47a (c) say is required. Those subparagraphs adhere strictly to the statute by holding that the power qualifies if it permits the life tenant to appoint *either* to herself *or* her estate. Yet the Second Circuit has interpreted subparagraph (14) to mean that the life tenant must have the right not only to appoint the property to herself during her lifetime or to her estate, but also to give the property away *and* be able to dispose of it by will. Section 812 (e)(1)(F) says nothing about giving the property away and specifically negates any requirement that the life tenant be able to dispose of the property by will. See the discussion of *Estate of Pipe* and *Estate of May, supra*, p. 9, and opinion below in the case at bar.

If a surviving spouse has the right to income from the property for life but no right during her lifetime to the corpus, it

is undisputed that her interest qualifies for the marital deduction if she has the power to appoint by will. Petitioner submits that a power such as in the case at bar to invade and consume, exercisable by the surviving spouse during her lifetime unlimited by any standard relating to health, education, support or welfare, is no different than a power of appointment exercisable by will and that to require that the surviving spouse must have the power to give the property away, and be able to dispose of it by will is to require that the power to appoint during her lifetime be a much broader power than a power exercisable by will. There is no statutory basis for such discrimination between a power exercisable by will and one exercisable during life.

Once the nature of the power has been determined, consideration must be given to whether the power is "exercisable in all events." Respondent has argued and the Circuit Court has held that the obligation to exercise the power in good faith provided by New York law prevents the power from being exercisable in all events, 297 F. 2d 891, 893. This construction has the effect of enlarging the nature of the power required to meet the statutory standard. It is submitted that the phrase "in all events" means that the power must not be limited by some specific event. "Events" do not have to do with rules of law and persons who can receive the property. They refer to specific happenings. The applicable regulations are clear on this subject. Regulation Sections 81.47 a(c)(15) and (16) *infra* p. 32, provide in part as follows:

> (15) • • • The power is not 'exercisable in all events', as required by Section 812(e)(1)(F), if it can be terminated during the life of the surviving spouse by any event other than her complete exercise or release thereof. For example, a power which is not exercisable in the event of the spouse's remarriage is not exercisable in all events.
>
> • • •

> (16) The power in the surviving spouse is exercisable in all events only if it exists immediately following the decedent's death. For example, if the power given to the surviving spouse is exercisable during life, but cannot be effectively exercised prior to distribution of the trust assets by the executor to the trustee, such power is not exercisable in all events.

"Good faith" is not an "event" limiting the exercise of a power. Neither is a requirement that the life tenant must be able to "give the property away" such an event.

Following passage of the 1954 Code, the Commissioner of Internal Revenue promulgated regulations under the marital deduction section, Section 2056, requiring that the life tenant must have the power to give the property away. This requirement was not found in the 1939 Code regulations. In spite of the fact that the 1954 Code and the 1958 Technical Amendments Act attempted to liberalize the 1939 Code provisions by permitting life interests which were not in trust to qualify, the Commissioner promulgated regulations under the 1954 Code which were more restrictive in this area than those under the 1939 Code. Life tenants typically do not have the power to create a fee in themselves and thereby dispose of the property by will. Neither do they have the power to give the property away. Congress could not and would not have intended that any such an artificial and unused form of interest should be required in order to qualify for the marital deduction.

As a bootstrap operation, the Commissioner has now amended the 1939 Code Regulations to conform them to the more restrictive requirements of the 1954 Code regulations. This amendment was made effective January 13, 1961, T.D. 6529, 1961-1 C.B. 768. They are clearly inconsistent with the statutory provisions and the intent of Congress. The lower Court has specifically disapproved of these regulations as being more restrictive than Congress intended on another point in-

volving the marital deduction, *Estate of Harry Gelb v. Commissioner of Internal Revenue*, 298 F. 2d 544 (2d Cir. decided January 22, 1962).

The issues presented by this argument are complex and require a careful reading of the statute, the regulations and the legislative history. When thoroughly studied, Petitioner believes that this Court will find that the argument proposed by Respondent and supported by the lower Court is not sound.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A-1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23—September Term, 1961.
(Argued November 17, 1961 Decided January 10, 1962.)
Docket No. 26879

UNITED STATES OF AMERICA,

Appellant,

—v.—

LINCOLN ROCHESTER TRUST COMPANY, as Administrator, c. t. a., of the Last Will & Testament of ALBERT E. COPELAND, deceased,

Appellee.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Western District of New York, Harold P. Burke, *Judge*, against the United States and in favor of plaintiff, taxpayer, holding that the widow's right to consume the principal of the estate in which she was given the income for life was sufficiently broad to take her life interest out of the class of terminable interests and to entitle the estate of the husband to the marital deduction under Section 812(e)(1)(F) of the Internal Revenue Code of 1939, as amended, 26 U. S. C. A. (1939 ed.), §812(e)(1)(F). Reversed and complaint dismissed.

Harold M. Seidel, Attorney, Dept. of Justice, Washington, D. C. (Louis F. Oberdorfer, Asst. Attorney General, Lee A. Jackson and Robert N. Anderson, Attorneys, Dept. of Justice, Wash., D. C., Neil R. Farmelo, U. S. Attorney and Anthony R. Palermo, Asst. U. S. Attorney, Western Dist. of New York, Buffalo, N. Y., on the brief), *for appellant.*

Scott Stewart, Jr., Rochester, New York (Sterling L. Weaver and Nixon, Hargrave, Devans & Dey, Rochester, New York, on the brief), *for appellee.*

SMITH, *Circuit Judge:*

This is an appeal by the Commissioner from a judgment of the District Court awarding taxpayer a refund for taxes paid on a deficiency assessment of $14,055.22 plus interest. The case was submitted on an agreed stipulation of facts which are fully set forth in the opinion below, reported at 188 F. Supp. 839 (W. D. N. Y. 1960).

The widow of deceased was given a life estate and the power to "use any part of the principal" of the estate. The District Court held that this gave the widow a right to consume the principal of the estate in which she was given the income for life, which power to consume was sufficiently broad to take her life interest out of the class of terminable interest and entitle her husband's estate to the marital deduction under Section 812(e)(1)(F) of the Internal Revenue Code of 1939, as amended, 26 U. S. C. A. (1939 ed.) Section 812(e)(1)(F). We hold that this language did not amount to a power in the surviving spouse to appoint in her own favor in all events and does not qualify for the marital deduction. We reverse and remand for dismissal of the complaint.

Two weeks after Judge Burke's decision this court decided *Estate of May v. Commissioner*, 283 F. 2d 853 (2 Cir. 1960),

cert. denied 366 U. S. 903 (1961), which held that under the law of New York the power to invade and consume any or all of the principal did not create a "power in the surviving spouse to appoint * * * in favor of such surviving spouse * * * *in all events*."[1] (Emphasis added.)

Unless the surviving spouse has the right to dispose of the principal by gift or otherwise in her absolute discretion the case is controlled by our decision in *May*, *supra*. The District Court relied on H. Rep. No. 1027, 85th Cong., 1st Sess., 1957, which accompanied H. R. 8881, passed by the House which contained a specific provision that although the surviving spouse must have the authority to give the property away it need not include the power to dispose of the property by will. H. R. 8881, however, never became law as written and passed by the House. H. R. 8381, which became Section 92(a) of the Technical Amendments Act of 1958, made no mention of the issue. The language referred to in this Report relied on by the District Court was not included in the Act as it finally was adopted. No reliance can therefore be placed on this portion of the Report in interpreting the Act.

In a proceeding concerning the will involved in the instant case the Surrogate's Court of Monroe County decided that the widow had the "unlimited right to consume * * * and that

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1 Internal Revenue Code of 1939, 812(e)(1)(F).

"In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

* * * * *

"This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

neither Section 141 nor 149 of the Real Property Law of New York [preventing a trustee from appointing to himself] restrict in any way the right * * * to consume any and all of the principal thereof." The statement that the right is unlimited apparently had reference only to the prohibitions of Sections 141 and 149 and whether they prohibit the surviving spouse from consuming the principal of the trust. There is no reason to believe that the Surrogate had reference to the well settled rule of New York that the right to consume is limited by a standard of good faith. The obligation, imposed by law, to exercise the power in good faith based upon honest judgment, *In re Britt's Will*, 71 N. Y. S. 2d 405 (App. Div. 1947), *In re Mitchell's Will*, 181 N. Y. S. 2d 436 (Surr. Court 1959), so limits the power to invade here that it is not a power exercisable in all events.

We held in *May's Estate v. Commissioner* that the existence of the obligation established that the power was not exercisable in all events. In *May* the testator bequeathed to his wife "the 'sole life use of' the residuary estate with the right in the sole discretion of my said wife to invade and use the principal not only for necessities but generally for her comfort, happiness and well-being." In the instant case the will provided:

> "I give, devise and bequeath to my wife, Jenny Morris Copeland, in case she survives me, the life use of all the rest, residue and remainder of my estate, both real and personal, wherever the same may be situated, with the right to use any part of the principal thereof."

In *Springett* (*In re Springett's Estate*, 206 N. Y. S. 2d 48 (Surr. Ct. 1960)) the will permitted the widow to consume the corpus to the extent she said was required for her proper maintenance and support. The Surrogate in *Springett* apparently considered that the provision for her own certification was in-

tended by the testator to establish the test to be applied of the obligation of good faith in the exercise of the power to invade. In *Woollard* (*In re Woollard's Estate*, 295 N. Y. 390, 68 N. E. 2d 181 (1946)), certification in writing was likewise held to meet the good faith requirement. No such specific provision to take the place of or fulfill the good faith requirement is found in this case. The will provision in the instant case is no broader than that in *May's Estate*. While the widow might consume the principal, she might only do so in good faith, and had no power to dispose of any portion not consumed, by gift or appointment to herself or others, by instrument *inter vivos* or will, disposition of any portion not so consumed being governed by testator's will. We adhere to the ruling in *May's Estate* that this is not a power exercisable *in all events*.

The ruling is quite technical, but unfortunately that is too often so in tax matters. There may be arguments of policy for change in the statutory requirements to broaden the marital deduction, but this is a matter for the Congress, which, with the problem plainly before it, failed in the Technical Amendments Act of 1958 to remove or modify the requirement that the power be exercisable in all events as a condition of the grant of the marital deduction in this situation.

The judgment of the District Court is reversed and the complaint dismissed.

APPENDIX A-2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

October 18, 1960

LINCOLN ROCHESTER TRUST COMPANY, as Administrator, c.t.a., of the Last Will and Testament of ALBERT E. COPELAND, Deceased,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civ. No. 7510

OPINION

Burke, Chief Judge.

This is a suit for refund of $14,055.22, with interest, paid as a deficiency assessment on the Federal Estate Tax by the estate of Albert E. Copeland. The question is whether the estate is entitled to a marital deduction under Sec. 812(e)(1)(F) of the 1939 Internal Revenue Code, as amended, by reason of a provision of the decedent's Will, devising to his widow a life estate with the right to use any part of the principal thereof.

The case was submitted on a written stipulation of facts, which facts are determined to be findings of fact herein.

The decedent died September 26, 1950. His Will provides in part as follows:

> "*SECOND:* I give, devise and bequeath to my wife, Jenny Morris Copeland, in case she survives me, the life

use of all the rest, residue and remainder of my estate, both real and personal, wherever the same may be situated, with the right to use any part of the principal thereof.

"*THIRD:* I give, devise and bequeath Thirty-five Per Cent (35%) of the residue of my estate, after the death of my said wife, or in case my said wife shall predecease me, to each of my sons Morris A. Copeland and Arthur H. Copeland.

* * *

"*FIFTH:* I direct that Thirty Per cent (30%) of the residue of my estate, after the death of my said wife, or in case my said wife shall predecease me, shall be held by my executor, or executors, for the benefit of such of my grandchildren as may survive both my said wife and me, share and share alike, * * *."

* * *

The Surrogate's Court of Monroe County in a proceeding to construe the Will held "that the purpose and effect of the said paragraph second of the decedent's Last Will and Testament was to give to Jenny Morris Copeland the life use of all of the residuary estate with an unlimited right to consume any or all of the principal thereof, * * *."

Plaintiff contends that the bequest to the decedent's widow of the life use of the residuary estate coupled "with the right to use any part of the principal thereof" satisfies the provisions of Sec. 812(e)(1)(F) of the Internal Revenue Code of 1939, as amended by the Technical Amendments Act of 1958 (P. L. 85-866, 72 Stat. 1606) and that, therefore, a marital deduction is allowable. The Government contends that the bequest does not qualify for the marital deduction, it being a terminable interest under Sec. 812(e)(1)(A) for which no deduction is allowable.

Sec. 812(e)(1)(F) as amended by the Technical Amendments Act of 1958 provides that an interest in property passing from the decedent to a surviving spouse under the terms of which she is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof and has a power to appoint the entire interest or such specific portion in her favor or in favor of her estate, will be considered as passing to the surviving spouse within the meaning of Sec. 812(e)(1)(F), provided the power is exercisable by will or during life and is exercisable by such spouse alone and in all events. In such case the interest passing will not be considered a terminable interest under the provisions of Sec. 812 (e)(1)(B).

The Government argues that the power given to the surviving spouse was, at most, a power to use and consume the principal for her own benefit, that it was not a power under which she could appoint unconsumed principal to herself or dispose of it to others of her own selection.

House Report No. 1027, 85th Congress, 1st Session, accompanying the amendment of Sec. 812(e)(1)(F) of the Internal Revenue Code of 1939 (Technical Amendments Act of 1958) under the heading—"Explanation of the Bill" reads in part as follows:

> "In addition, the last sentence of subsection (a) of the bill provides that a power exercisable in all events includes an unrestricted power exercisable by the surviving spouse at any time during her life to use all or part of the property subject to the power, where the power includes the right to dispose of the property in any manner (including the power to dispose of it by gift), but such right does not have to include the power to dispose of the property by will. The purpose of this concluding sentence is to describe the general conditions under which

the right of the surviving spouse to use, consume, or invade the property during life is the equivalent of the right to dispose of it by will and therefore the equivalent of a general power of appointment. This provision is intended to insure that the marital deduction will be allowed in cases where the property subject to the power would be includible in the gross estate of the spouse upon her death. Thus, where the spouse has a power to consume, invade, or appropriate the property, and she is the sole judge of what the invasion, consumption, or appropriation is needed for, such a power is intended to come within this provision. For example, if the surviving spouse has, in addition to a life interest, the unrestricted right, in her sole discretion, to invade and use the property generally for her comfort, happiness and well being, such a power would meet the test prescribed by the last sentence of subsection (a) even though there is no separately stated power to dispose of the property. These broad powers in the surviving spouse to use, consume, or invade give the spouse an interest equivalent to a general power of appointment, which makes the property includible in the spouse's gross estate upon death. From this it follows that the marital deduction is allowable with respect to such a property interest. This is the result under the 1954 Code and the bill makes it clear that it is to be the result under the 1939 Code."

Thus, Congress has expressed the intent as to the nature of the unlimited power to invade required to comply with the terms of the statute. This can only mean that a broad power to invade during life is the equivalent of a general power of appointment exercisable by Will and is sufficient to qualify for the marital deduction. The surviving spouse in the instant case has an unlimited right to consume any and all of the prin-

cipal. This is at least as broad a power to invade as was contained in the example cited in House Report No. 1027, *viz.*, "the unrestricted right, in her sole discretion to invade and use the property generally for her comfort, happiness and well being." Thus it meets the test prescribed by the last sentence of subsection (a) of the Technical Amendments Act of 1958.

Estate of Pipe v. Commissioners, (2 Cir. 1957), 241 F. 2d 210, held that, where the decedent's will gave the residuary estate to his wife for life with power to use the income and principal during her life in her uncontrolled discretion but without power to make testamentary disposition of the part which remained unexpended at her death, the bequest did not qualify for the marital deduction. This case was decided February 7, 1957, before the enactment of the Technical Amendments Act of 1958 and before August 7, 1957, the date of House Report No. 1027. For that reason I do not consider the case as controlling.

My conclusion is, therefore, that the life estate in the instant case qualifies for the marital deduction under the statute as amended, and that the plaintiff is entitled to judgment.

Settle judgment on notice.

HAROLD P. BURKE,
U. S. District Judge.

Oct. 18, 1960.

APPENDIX B-1
Statutes and Regulations

Section 811(F)

(3) *Definition of general power of appointment.* For the purposes of this subsection the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent, shall not be deemed a general power of appointment.

(B) A power of appointment created on or before October 21, 1942, which is exercisable by the decedent only in conjunction with another person shall not be deemed a general power of appointment.

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person—

(i) if the power is not exercisable by the decedent except in conjunction with the creator of the power—such power shall not be deemed a general power of appointment.

(ii) if the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent—such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

(iii) if (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person—such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the num-

ber of such persons (including the decedent) in favor of whom such power is exercisable.

For the purposes of clauses (ii) and (iii) a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

APPENDIX B-2

Section 812(e)(1),

(F) [As amended by Sec. 93 (a) of the Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] *Life Estate With Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(i) the interest or such portion thereof so passing shall, for purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(26 U. S. C. 1952 ed., Sec. 812.)

APPENDIX B-3

Section 81.47a of Treasury Regulations 105.

(C) *Trust with power of appointment in surviving spouse.* (1) In the case of property interests which passed from the decedent to a trust, the terms of which satisfy the five conditions stated in this paragraph, the expression "passed from the decedent to his surviving spouse" embraces not only the beneficial interest therein of such spouse but also the interest therein subject to her power to appoint. (As to the treatment of trusts not meeting such conditions, see paragraph (b) (2) of this section.) The five conditions which must be satisfied by the terms of the trust are as follows:

(i) The surviving spouse must be entitled for life to all the income from the corpus of the trust.

(ii) Such income must be payable annually or at more frequent intervals.

(iii) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint the entire corpus free of the trust.

(iv) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

(v) The corpus of the trust must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse.

* * *

(13) In order to satisfy conditions in subparagraph (1) (iii) and (iv) of this paragraph, the power of the surviving spouse to appoint the entire corpus free of the trust must fall within one of the following categories:

(i) A power so to appoint fully exercisable in her own favor at any time following the decedent's death (as, for example, an unlimited power to invade).

(ii) A power so to appoint exercisable in favor of her estate. Such power, if exercisable during life, must be fully exercisable at any time during life, or, if exercisable by will, must be fully exercisable irrespective of the time of her death.

(iii) A combination of the powers described under subdivisions (i) and (ii) of this subparagraph. For example, the surviving spouse may until she attains the age of 50 years have a power to appoint to herself and thereafter have a power to appoint to her estate. However, the condition in subparagraph (1) (iv) of this paragraph is not satisfied unless irrespective of when the surviving spouse may die the trust corpus will at the time of her death be subject to one or the other such power.

(14) The power in the surviving spouse must be a power to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases. Thus, if the surviving spouse entered into a binding agreement with the decedent to exercise the power only in favor of their issue, the condition in subparagraph (1) (iii) of this paragraph is not met. The trust will not be regarded as failing to satisfy the condition in subparagraph (1) (iii) of this paragraph merely because takers in default of the surviving spouse's exercise of the power are designated by the decedent. The decedent may provide that, in default of the exercise of the power, the trust shall continue for an additional period.

(15) In order for the condition in subparagraph (1) (iv) of this paragraph to be satisfied, the power in the surviving spouse to appoint the corpus to herself or to her estate must be exercisable without the joinder or consent of any other per-

son. The power is not "exercisable in all events", as required by section 812(e)(1)(F), if it can be terminated during the life of the surviving spouse by any event other than her complete exercise or release thereof. For example, a power which is not exercisable in the event of the spouse's remarriage is not exercisable in all events.

(16) The power in the surviving spouse is exercisable in all events only if it exists immediately following the decedent's death. For example, if the power given to the surviving spouse is exercisable during life, but cannot be effectively exercised prior to distribution of the trust assets by the executor to the trustee, such power is not exercisable in all events. Similarly, if the power is exercisable by will, but cannot be effectively exercised in the event the surviving spouse dies before receipt of the trust assets by the trustee, such power is not exercisable in all events. However, the trust will not be disqualified by the mere fact that, in the event the power is exercised during administration of the estate, payment of the assets to the appointee will be delayed for the period of administration. If the power is in existence at all times following the decedent's death, limitations of a formal nature will not disqualify. Examples of formal limitations on a power exercisable during life are requirements that exercise must be in a particular form, that it must be filed with the trustee, that reasonable notice must be given, or that reasonable intervals must elapse between successive partial exercises. Examples of formal limitations on a power exercisable by will are that it must be exercised by a will executed by the surviving spouse after the decedent's death or that exercise must be by specific reference to the power.

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

Estate of RALPH G. MAY, MILDRED K. MAY, Executrix,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 2, Docket 25944.

Argued Sept. 30, 1960.
Decided Nov. 2, 1960.

Albert R. Mugel, Buffalo, N. Y. (John G. Putnam, Jr., Jaeckle, Fleischmann, Kelly, Swart & Augspurger, Buffalo, N. Y., on the brief), for petitioner-appellant.

Harold M. Seidel, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson, Robert N. Anderson, Attys., Dept. of Justice, Washington, D. C., on the brief), for respondent-appellee.

Before LUMBARD, Chief Judge, and TUTTLE* and FRIENDLY, Circuit Judges.

TUTTLE, Circuit Judge.

This petition for review tests the correctness of the decision of the Tax Court holding that a bequest by the testator, Ralph G. May, to his wife of the "sole life use of" the residuary es-

* Of the Fifth Circuit, sitting by designation.

tate "with the right in the sole discretion of my said wife to invade and use the principal not only for necessities but generally for her comfort, happiness and well-being" did not meet the requirements of the marital deduction provisions of the Internal Revenue Code.[1] We affirm the decision of the Tax Court.

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1 Section 812(e)(1)(A)(B) and (F) of the Internal Revenue Code of 1939, as amended, 26 U. S. C. A. Sec. 812(e)(1)(A, B, F), is as follows:

"Sec. 812. Net Estate.

"For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * *

"(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] Bequests, etc. to Surviving Spouse.

"(1) Allowance of marital deduction.—

"(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

"(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * * *

"(F) [As amended by Sec. 93(a), Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] Life Estate With Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to

(Footnote continued on following page)

The whole burden of petitioner's argument here is that the broad power given to Mrs. May to "invade and use the principal" is tantamount to a power to appoint the estate to herself and in favor of her estate. The Commissioner answers that under the applicable New York law such broad powers of invasion and use do not comprehend the right to either unrestricted prodigal use or to the assertion of complete ownership as including the ability to make a gift to others of any of the principal.

There is no real dispute as to the holding of the New York cases. Under them it is clear that a spouse, even with these broad powers of invasion and use, cannot appoint to herself. Matter of Briggs' Will, 101 Misc. 191, 167 N. Y. S. 632, modified 180 App. Div. 752, 168 N. Y. S. 597, affirmed 223 N. Y. 677, 119 N. E. 1032; Matter of Britt's Will, 272 App. Div. 426, 71 N. Y. S. 2d 405. This Court has given recognition to this legal proposition, albeit by dictum, in Matteson v. United States, 240 F. 2d 517. In that case the trial court had held that a broad power of invasion was, under New York law, limited by the exercise of good faith, and held that the spouse did not have the power to appoint to herself or to her estate. On appeal this Court decided the case on another issue. Nevertheless, the Court said:

> "To make not wholly fruitless the earnest presentation on the merits by counsel, perhaps somewhat decoyed by defendant's submission of the formal judgment, we

(Footnote continued from preceding page)
appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

"(i) the interest or such portion thereof so passing shall, for purposes of subparagraph (A), be considered as passing to the surviving spouse, and

"(ii) no part of the interest so passing shall, for purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

> say that examination of Judge Foley's careful analysis of the law and relevant decisions, state and federal, discloses no sound basis for upsetting his conclusions." 240 F. 2d 517, 519.

The taxpayer strenuously argues here that the result of this holding is too harsh to have been within the intent of Congress in adopting the marital deduction provision. From this it is argued, as a guide to the construction of Section 812(e)(1)(F), that since the provisions of Section 811(f)(3) are broad enough to make taxable in Mrs. May's estate this very power which she has to invade and use, such power should be held to be broad enough under Section 812(e)(1)(F) to satisfy the marital deduction requirement. We know of no rule of construction that permits the court to resort to legislative history or to other sections not necessarily correlated with the one under scrutiny to determine the meaning of language which is as clear as is that of Section 812(e)(1)(F).

It may well be that the entire residuary estate will, on Mrs. May's death, be a part of her taxable estate, even though she does not have the power to donate or appoint any part of it to any other person. This might result from the application of Section 811(f)(3) which may (although we do not so decide) define a general power of appointment broadly enough to include an unrestricted power to invade and use.

However, we think we need not speculate on whether Congress intended to equate the general power of appointment described in Section 811 with the "power in the surviving spouse to appoint * * * (exercisable in favor of such surviving spouse) * * * alone and in all events." We have already, in Pipe's Estate v. Commissioner, 2 Cir., 241 F. 2d 210, again by way of dictum,[2] construed the unlimited power to invade

2 The Court held that a *legal* life estate could not qualify under the provisions of the Section as it then stood, but, then stating the assumption that the section was applicable to a legal life estate, the Court answered the precise question that is here before us.

necessary to satisfy Section 811(f)(3) as requiring that the life tenant be able to devise the property. We held there what is equally plain here: that the power to invade at will does not comprehend the important power to appoint to the spouse or her estate.

Finally, as to the argument that the disallowance of a deduction for this bequest would be an unfair double tax on this residuary estate, we need only quote the answer given to this same argument in the Pipe's opinion:

> "Lastly, the appellant argues that the disallowance of a deduction for this bequest would frustrate the clear intent of Congress in enacting the marital deduction provisions in 1948. Citing extensive legislative history, e. g., S. Rep. No. 1013, 80th Cong., 2d Sess. (1948), the appellant points out that Congress sought a general uniformity of tax treatment of decedents' estates in both community property and common law states. The method adopted, in general, was to permit a deduction from the gross estate of the spouse who first deceased for the value of property that would be included, if not consumed, in the gross estate of the surviving spouse, thereby subjecting the value of that property so deducted to only one estate tax, which would be exacted at the survivor's death. Mrs. Pipe argues that the unconsumed principal of her life estate will be included in her gross estate for federal tax purposes because of her unqualified power to invade the corpus during her lifetime. It is not necessary for us, however, to determine the validity of this contention, because the possibility of double taxation is not a sufficient basis for allowing a marital deduction if the bequest does not comply with the specific statutory requirements of section 812(e). Starrett v. Commissioner, 1 Cir., 1955, 223 F. 2d 163. *Cf.* Estate of Shedd v. Commissioner, 9 Cir., 1956, 237 F. 2d 345; Estate of Hoffenberg v. Commissioner, 1954, 22 T. C. 1185, affirmed *per curiam*, 2 Cir., 1955, 223 F. 2d 470. Here the appellant has failed to prove that this bequest falls within any of the express provisions for marital deductions under the 1939 Code." 241 F. 2d 210, 214.

The Third Circuit case of Commissioner of Internal Revenue v. Ellis' Estate, 3 Cir., 252 F. 2d 109, is in accord with what this Court said in Pipe's Estate v. Commissioner, *supra*. The later Third Circuit case, Hoffman v. McGinnes, 3 Cir., 277 F. 2d 598, is distinguishable on the ground that the Court found the will there before it for construction did in fact, under the Pennsylvania law, create a power in the spouse to appoint to herself. As we have said above, petitioner here does not dispute the Commissioner's contention that under New York law the May will cannot be so construed.

It may be appropriate to comment briefly on the contention of the petitioner here, as it was of the appellant in the Pipe's case, that the Court should not so construe this section as to make possible the achievement of different results depending upon the state in which the parties reside. It seems to us that this is merely an attempt to put the "cart before the horse." Section 812(e)(1)(F) makes it perfectly simple for any testator to make absolutely certain that his bequest will be considered as a marital deduction. All he has to do is to grant to the spouse "power * * * to appoint the entire interest, or [a] specific portion" in favor of herself or her estate, exercisable in all events, and that he grant no such power to any other person to appoint to any person other than the spouse. A will which contains a bequest for life to the wife expressly granting these powers has the same effect in any state in which the will is probated. There is, thus, complete uniformity if the statute is followed. The only occasion in which a lack of uniformity arises is when a testator's personal representative seeks to have the Court hold that something different from, or less than, the express requirements of the statute accomplish the same result. In such event the burden falls to the taxpayer to show that in *his* state the estate granted to the wife is, in law, indistinguishable from that which is set out in Section 812(e)(1)(F).

In Pennsylvania, as the Court of Appeals said in Hoffman v. McGinnes, *supra*, the courts have held that a bequest having powers somewhat broader than those contained in Mr. May's will gives the life tenant the power to obtain a transfer of the entire corpus of the estate, thus becoming the sole owner in fee. Thus, the net result is that a testator living in Pennsylvania can satisfy the language of Section 812(e)(1)(F) by the use of language which in New York State simply does not accomplish the same purpose. We think it is not a construction giving unequal effect to the taxing acts for us to construe the language of this section in such manner as to require literal compliance with the statute, which is simple, or creating an estate which in the state of administration places the parties in exactly the same legal position as they would occupy if the statute had been literally complied with.

The decision of the Tax Court is affirmed.